Supreme Court, U.S.
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IN THE

Supreme Court of the United States

PETER BALOGUN,

PETITIONER,

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL,

RESPONDENT.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

A. Whether the term "victim" as used in section 101(a)(43)(M)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(M)(i), includes the Government since the term "victim" ordinarily refers to a person, a term which, under the Dictionary Act, 1 U.S.C. § 1, U.S. Supreme Court precedent, and decisions of the Eleventh Circuit and its sister circuits, does not include the sovereign, unless there is an affirmative showing to the contrary?

B. Whether the court below erred by holding that the "pardon waiver" codified at section 237(a)(2)(A)(v) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(v), can never be effective in inadmissibility proceedings despite the fact that such a holding ignored over fifty years of agency precedent and violated petitioner's right to equal protection of the laws under the Fifth Amendment to the United States Constitution?

PARTIES TO THE PROCEEDINGS
AND
CORPORATE DISCLOSURE STATEMENT

The parties involved in this proceeding are listed on the cover.

This petition is not being filed by or on behalf of a nongovernmental corporation.

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CITATIONS TO OFFICIAL AND UNOFFICIAL REPORTS OF DECISIONS AND ORDERS ENTERED BY COURTS AND ADMINISTRATIVE AGENCIES

The decision of the United States Court of Appeals for the Eleventh Circuit is reported at *Balogun v. U.S. Attorney General*, 425 F.3d 1356 (11th Cir. 2005) and is reproduced in the Appendix to this Petition.

The decision of the Board of Immigration Appeals denying Petitioner's Motion to Reopen his removal proceedings appears at pages 000001 to 000002 of the Administrative Record ("A.R.") and is reproduced in the Appendix to this Petition at pages A-15 to A-17.

The decision of the Board of Immigration Appeals dismissing Petitioner's appeal from the decision of the immigration judge appears at pages 000022 to 000023 of the Administrative Record and is reproduced in the Appendix to this Petition at pages A-18 to A-19.

The decision of the immigration judge ordering Petitioner's removal from the United States and denying him relief from removal appears at pages 000052 to 000058 of the Administrative Record and is reproduced in the Appendix to this Petition at pages A-20 to A-28.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Eleventh Circuit entered its decision on the merits of Petitioner's Petitions for Review filed with that court on September 26, 2005. Petitioner timely filed a Petition for Rehearing and Rehearing En Banc with the Eleventh Circuit, which it denied on December 20, 2005. The Eleventh Circuit's Mandate issued on December 29, 2005.

The Eleventh Circuit had jurisdiction to review the decisions of the Board of Immigration Appeals pursuant to section 106(a)(1)(A)(iii) of the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 310 (May 11, 2005), codified at 8 U.S.C. § 1252(a)(2)(D). Because constitutional questions and questions of law are at issue in this matter, as opposed to issues of discretion, this Court, like the Eleventh Circuit, has jurisdiction to review Petitioner's case under section 106(a)(1)(A)(iii) of the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 310 (May 11, 2005), codified at 8 U.S.C. § 1252(a)(2)(D). Section 1254 of Title 28 of the United States Code confers jurisdiction on this Court to hear Petitions for Writ of Certiorari from the decisions of the Courts of Appeal.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED IN THE CASE

Note: All authorities listed here have been reproduced in the Appendix.

Constitutional Provisions

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Immigration and Nationality Act of 1952, as amended (codified at 8 U.S.C. §§ 1101 *et seq.*)

Section 101(a)(13) (codified at 8 U.S.C. § 1101(a)(13))

Section 101(a)(43)(M) (codified at 8 U.S.C. § 1101(a)(43)(M))

Section 212(a)(2)(A)(i) (codified at 8 U.S.C. § 1182(a)(2)(A)(i))

Section 212(h) (codified at 8 U.S.C. § 1182(h))

Section 237(a)(2)(A) (codified at 8 U.S.C. § 1227(a)(2)(A))

Decision of the Board of Immigration Appeals

Matter of H—, 6 I. & N. Dec. 90 (BIA 1954)

STATEMENT OF THE CASE

Dr. Peter Balogun came to the United States as a student in 1960. He came from Nigeria, where he was born. During the 1960s, Dr. Balogun took degrees from Cornell University and the Tuskegee Institute.

He is now 66 years old, and he has lived in the United States for more than 45 years of those 66 years.

In 1968, Dr. Balogun became a permanent resident of the United States. He has not naturalized as a United States, though he has been an active member of the communities in which he has lived in America. He helped black candidates get elected in Alabama during times in which that was still novel. He has supported the town of Tuskegee, Alabama, and the university that bears its name.

Dr. Balogun's family, consists of his three children, all of whom are United States citizens, and live in America. He is close to each of his children.

But in 1988, Dr. Balogun went to trial in the United States District Court for the Middle District of Alabama. He had been the director of the Macon County (Alabama) Community Action Committee, which ran the local, federally funded Head Start program. He was charged with numerous offenses, but, in the end, the jury found him guilty of only one count of embezzlement in violation of 18 U.S.C. § 641 and one count of conspiracy to embezzle in violation of 18 U.S.C. § 371.

While the precise amount involved in the embezzlement is in some dispute, it was, without question, greater than $ 10,000. There were no private parties victimized by the offense.

Following his conviction, he was sentenced to serve concurrent terms of 15 months in prison. He completed his sentence.

The State of Alabama's Board of Pardons and Paroles may "entertain petitions for pardon from convictions in the courts of the United States or of other States, if the petitioner is, at the time of application and at the time of consideration, a resident of Alabama." Alabama Board of Pardons and Paroles, Rules, Regulations, and Procedures, Article 8, section 3, *available at* http://paroles.state.al.us/alabpp/main/ALABPP%20MAIN.htm (last visited Feb. 20, 2006). In 1995, Dr. Balogun resided in Alabama and

he applied to the Alabama Board of Pardons and Paroles for a pardon for his 1988 federal conviction. In 1997, the Board of Pardons and Paroles pardoned Dr. Balogun. (*See Certificate of Pardon with Restoration of Civil and Political Rights* (Apr. 27, 1997), APPENDIX at A-47 to A-49, A.R. at 252). That pardon was limited in its scope. For example, it did not, by its terms, prohibit the conviction from being used to find Dr. Balogun to be a habitual felon or allow Dr. Balogun to possess a firearm.

In 2002, Dr. Balogun traveled briefly outside the United States. Upon his return on October 28, 2002, he was detained because the immigration authorities believed that his 1988 criminal conviction made him inadmissible. The immigration authorities issued Dr. Balogun a Notice to Appear (*See* APPENDIX at A-21, A.R. at 000104) on November 6, 2002. It charged him as being a inadmissible under section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act of 1952, as amended, which is codified at 8 U.S.C. § 1182(a)(2)(A)(i)(I). That section makes an alien who has been convicted of a crime involving moral turpitude inadmissible.

In removal proceedings before an Immigration Judge in Atlanta, Georgia, Dr. Balogun conceded that he was an alien seeking admission to the United States who was inadmissible because of his conviction for having committing a crime involving moral turpitude. As relief from removal, Dr. Balogun sought, *inter alia* termination of the removal proceedings so that he could apply for naturalization and a waiver of his inadmissibility grounds under section 212(h) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(h). The Immigration Judge pretermitted—that is, denied—his applications for relief from removal and ordered Dr. Balogun's removal to Nigeria. (*See Decision and Order of the Immigration Judge* (Apr. 1, 2003), APPENDIX at A-20 to A-28, A.R. at 52).

Dr. Balogun filed a timely administrative appeal of the Immigration Judge's order with the Board of Immigration Appeals. Before the Board of Immigration Appeals, Dr. Balogun argued that the Immigration Judge erred when he pretermitted Dr. Balogun's application for a waiver of his inadmissibility grounds under section 212(h) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(h). On April 20, 2004, the Board of Immigration Appeals dismissed Dr. Balogun's appeal. (*See Decision of the Board of Immigration Appeals* (Apr. 20, 2004), APPENDIX at A-18 to A-19,

A.R. at 000022-000023). In its decision the Board of Immigration Appeals stated:

> We reject the respondent's argument that the term "victim" in section 101(a)(43)(M)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(M)(i), cannot include the United States, and do not find support for this argument in the different language used in section 101(a)(43)(M)(ii) given that the offense in this latter subsection is one described in the Internal Revenue Code.

(*Id.*)

Dr. Balogun filed a timely Petition for Review of the decision of the Board of Immigration Appeals with the United States Court of Appeals for the Eleventh Circuit on May 19, 2004.

On March 2, 2004, the Alabama Board of Pardons and Paroles granted Dr. Balogun a full and unconditional pardon for his 1988 conviction. (See Certificate of Pardon with Restoration of Civil and Political Rights (Mar. 2, 2004), APPENDIX at A-47 to A-49, A.R. at 000019). Seven days after the Board of Immigration Appeals issued its decision dismissing Dr. Balogun's appeal, the Alabama Board of Pardons and Paroles mailed a copy of the Certificate of Pardon with Restoration of Civil and Political Rights to Dr. Balogun. (*Id.*)

Based on the new full and unconditional pardon, Dr. Balogun filed a motion to reopen his removal proceedings with the Board of Immigration Appeals, arguing that newly discovered evidence, namely the pardon, operated to waive his inadmissibility grounds. On August 23, 2004, the Board of Immigration Appeals denied the motion, stating:

> Initially, we find that the respondent's motion to reopen was filed in a timely manner. See 8 C.F.R. § 1003.2(c)(2). We further find that the respondent has provided new evidence that was previously unavailable at the former hearing. See 8 C.F.R. § 1003.2(c)(1). However, while the respondent has offered a "Certificate of Pardon with Restoration of Civil and Political Rights" issued by the Alabama Board of Pardons and Paroles, the respondent was convicted of federal offenses in the United States District Court for the Middle District of

> Alabama. We do not find that the evidence or argument advanced with this motion adequately establishes that such a state pardon releases the respondent from all legal consequences flowing from his federal criminal convictions.

(See Decision of the Board of Immigration Appeals (Aug. 20, 2004), APPENDIX at A-3, A.R. 000001.)

Dr. Balogun timely filed a Petition for Review of the decision of the Board of Immigration Appeals denying his motion to reopen on September 2, 2004. The United States Court of Appeals for the Eleventh Circuit consolidated Dr. Balogun's petitions for review on September 16, 2004.

In his petitions, Dr. Balogun argued that the Board of Immigration Appeals erred when it ruled that the Government was a "victim" for purposes of determining whether Dr. Balogun had been convicted of an aggravated felony as defined by section 101(a)(43)(M)(i) of the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. § 1101(a)(43)(M)(i) and by denying his motion to reopen since his pardon relieved him of the consequences of his conviction for immigration purposes. At oral argument, the panel hearing the case raised the issue of whether a pardon can ever be effective to relieve the immigration consequences of a conviction for an alien in removal proceedings charging him with being inadmissible. The panel raised this issue *sua sponte* and did not give the parties the opportunity to brief the issue.

In a decision filed on September 26, 2005, the Eleventh Circuit denied Dr. Balogun's petitions for review. In its decision, the Court ruled that the Government can be a "victim" under section 101(a)(43)(M)(i) of the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. § 1101(a)(43)(M)(i) and that a pardon can never be effective to waive an alien's inadmissibility.

Dr. Balogun filed a timely Petition for Rehearing and Rehearing En Banc with the Eleventh Circuit on or about September 2, 2004, arguing the following four issues:

1. Whether the panel erred when it held that a full and unconditional pardon may never serve to ameliorate the consequences of a conviction, where the offender is alleged to be an inadmissible, as opposed to

deportable, alien, notwithstanding that the Board of Immigration Appeals ("Board" or "BIA") has held otherwise?

2. Whether the panel erred by not holding that a full and unconditional pardon blots out the existence of guilt for a crime involving moral turpitude, making the alien admissible to the United States?
3. Whether the panel erred by not considering that a full and unconditional pardon forgives an aggravated felony conviction, such that the pardoned offender may apply for a waiver of inadmissibility?
4. Whether the panel erred by holding that the term "victim," in the context of INA § 101(a)(43)(M)(i), 8 U.S.C. § 1101(a)(43)(M)(i), includes the Government, notwithstanding the fact that the term "victim" ordinarily refers to a person, a term which, under the Dictionary Act, 1 U.S.C. § 1, U.S. Supreme Court precedent, and decisions of the Eleventh Circuit and its sister circuits, does not include the sovereign, unless there is an affirmative showing to the contrary?

Dr. Balogun also raised the issue of whether the Eleventh Circuit's holding violated his right to the equal protection of the laws.

On December 20, 2005, the Eleventh Circuit denied Dr. Balogun's Petition for Rehearing and Rehearing En Banc. (APPENDIX at A-3.) This Petition follows.

ARGUMENT

This case presents compelling factors that militate for granting Petitioner's Petition for a Writ of Certiorari. The issues in this case present important federal questions affecting not only immigration law, but also the interpretation of federal statutes generally.

The U.S. Court of Appeals for the Eleventh Circuit departed from the accepted and usual manner of interpreting federal statutes, and it entered a decision that places it in conflict with its own decisions, the decisions of this Court and the decisions of its sister circuits. The Eleventh Circuit's decision denied Petitioner his constitutionally protected right to receive the equal protection of the

laws and it offends the meaning of the statute which it purports to interpret.

Specifically, the Eleventh Circuit erred in holding that the term "victim" in section 101(a)(43)(M)(i) of the Immigration and Nationality Act ("INA") of 1952, as amended and as codified at 8 U.S.C. § 1101 *et seq.*, includes the government and in finding that the a pardon can never be effective to waive the consequences of an alien's criminal conviction if the alien has been placed into removal proceeding based on grounds of inadmissibility, as opposed to deportability.

Petitioner will address each of these in turn.

I. The Term "Victim" as Used in Section 101(a)(43)(M)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(M)(i), Was Not Meant to Include the Government

The Eleventh Circuit ruled that Dr. Balogun's embezzlement offense was an aggravated felony because the term "victim" in INA § 101(a)(43)(M)(i), 8 U.S.C. § 1101(a)(43)(M)(i), necessarily includes the government. In this, it erred, placing the court's decision at odds with its own case law, that of the Supreme Court of the United States and its sister circuits.

The circuit court's error has profound implications. It expands the definition of the term "aggravated felony" greatly, it affects the manner in which courts are to interpret statutory language, and it provides far too much deference to agency interpretations of the statute in violation of this Court's precedents. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 447-48, 107 S. Ct. 1207, 94 L. Ed. 2d 434, 457-58 (1987) (holding that *Chevron* deference is not due an agency's statutory interpretation where the meaning of the statute is sufficient to provide a court with the statute's meaning); *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, n. 9, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984) (holding that deference is not due to an agency interpretation where a court can divine the intended meaning of the statutory language at issue using traditional tools of statutory construction).

It also creates a split among the various circuits with respect to the interpretation of both the Dictionary Act, 1 U.S.C. § 1, and the

Immigration and Nationality Act of 1952, as amended, 8 U.S.C. § 1101 et seq.

In common usage, the term "victim" refers to a "person." *See* WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 2119 (Barnes & Noble Publishing, Inc. 2003) (defining the term "victim" to mean "a *person* who is deceived or cheated" or who "suffers from a destructive or injurious action") (emphasis added); *United States v. Ekanem*, 383 F.3d 40, 42-43 (2d Cir. 2004) (finding that the Dictionary Act, 1 U.S.C. § 1, controls the meaning of the term "victim" where the context of the statute fails to indicate that the statute does not use the default definition of "person" specified in the Dictionary Act). There is "longstanding interpretative presumption that [the term] 'person' does not include the sovereign." *Vermont Agency of Natural Res. v. United States*, 529 U.S. 765, 780-81, 120 S.Ct. 1858, 146 L.Ed.2d 836 (2000). The sovereign is presumed not to be included within the definition of "person" in a statute, unless the context of the statute at issue clearly indicates otherwise. 1 U.S.C. § 1; *Vermont Agency of Natural Res. v. United States*, 529 U.S. at 780-81, 120 S.Ct. 1858, 146 L.Ed.2d 836 (2000); *United States v. United Mine Workers of America*, 330 U.S. 258, 91 L. Ed. 884, 67 S. Ct. 677 (1947) (stating that in common usage the term "person" does not include the sovereign); s*ee United States v. Belgarde*, 300 F.3d 1177, 1181 (9th Cir. 2002) (dismissing a burglary indictment because a government entity may not be a victim since it is not a person); *United States v. Errol D.*, 292 F.3d 1159, 1162-64 (9th Cir. 2002) (same); *see also Sierra Club v. Martin*, 110 F.3d 1551, 1555 (11th Cir. 1997) (holding that the U.S. cannot prosecute a federal agency because the sovereign is not a person); *Virginia Office for Protection and Advocacy v. Reinhard*, 405 F.3d 185, 189 (4th Cir. 2005) (holding that a state sovereign cannot be sued under § 1983 because the sovereign is not a person and noting that the presumption that "person" does not include the sovereign may only be overcome by an "affirmative showing of statutory intent to the contrary); *Ki Se Le v. Ashcroft*, 368 F.3d 218, 226 (3d Cir. 2004) (Alito, J., dissenting) (stating that to hold, as the Third Circuit did, that the filing of a false income tax return does not fall under INA § 101(a)(43)(M)(i), one must argue that the term "victim" was not meant to apply to the government); *but see Abreu-Reyes v. INS*, 292 F.3d 1029, 1034 (9th Cir. 2002) (assuming without discussion

that the U.S. Treasury can be a victim under INA § 101(a)(43)(M)(i), 8 U.S.C. § 1101(a)(43)(M)(i)).

Context, as meant by the Dictionary Act, is a narrow term referring to the words around the operative term. *Rowland v. California Men's Colony*, 506 U.S. 194, 199-200, 113 S. Ct. 716, 121 L. Ed. 2d 656, 664-65 (1993). It does not include legislative history. *Id.*

The context of INA § 101(a)(43)(M)(i), 8 U.S.C. § 1101(a)(43)(M)(i), does not clearly indicate that Congress meant for the sovereign to be included in the definition of the term "victim." *Ki Se Le v. Ashcroft*, 368 F.3d 218 at 226 (Alito, J., dissenting) (stating that to hold, as the Third Circuit did, that the filing of a false income tax return does not fall under INA § 101(a)(43)(M)(i), one must argue that the term "victim" was not meant to apply to the government); *but see Abreu-Reyes v. INS*, 292 F.3d at 1034 (assuming without discussion that the U.S. Treasury can be a victim under INA § 101(a)(43)(M)(i), 8 U.S.C. § 1101(a)(43)(M)(i)). In fact, the context of the statute at issue indicates that the government was not intended to be included within the definition of the term "victim." Ordinary rules of statutory construction confirm that, as does the interpretative rule that deportation statutes are to be strictly construed in favor of the alien. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449, 107 S. Ct. 1207, 94 L. Ed. 2d 434, 459 (1987); *Costello v. INS*, 376 U.S. 120, 128, 84 S. Ct. 580, 11 L. Ed. 2d 559 (1963); *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10, 68 S. Ct. 374, 92 L. Ed. 433 (1948).

The text of section 101(a)(43)(M) of the INA, 8 U.S.C. § 1101(a)(43), as relevant here, defines the term "aggravated felony" to mean:

> (M) an offense that—
>
> > (i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or
> >
> > (ii) is described in section 7201 of title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000[.]

It is either a "loss to the victim or victims" or a "loss to the Government" that will cause an offender to be an aggravated felon. As noted above, the word "victim" is commonly understood to mean a person. *See* WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 2119 (Barnes & Noble Publishing, Inc. 2003) (defining the term "victim" to mean "a *person* who is deceived or cheated" or who "suffers from a destructive or injurious action") (emphasis added); *United States v. Ekanem*, 383 F.3d 40, 42-43 (2d Cir. 2004) (finding that the Dictionary Act, 1 U.S.C. § 1, controls the meaning of the term "victim" unless the context clearly indicates otherwise). Reading the phrase "loss to the victim or victims" within its context, it can be seen that the term victim was not intended to encompass the Government. That context, viewed through the lens of ordinary rules of statutory construction, shows that Congress meant that the Government could only be a victim for aggravated felony purposes if the loss resulted from the crime of tax evasion.

Expressio unius est exclusio alterius—that is, the expression or inclusion of one thing is the exclusion of others—describes one way to achieve a literal interpretation of a statute. Another is that the specific in a statute governs the general. *See, e.g., Rowland v. California Men's Colony*, 506 U.S. 194, 200, 113 S. Ct. 716, 121 L. Ed. 2d 656, 665 (1993) (noting that ordinary rules of statutory construction prefer specific definitions over general ones).

A literal interpretation of a statute must prevail where a statute is penal in nature. Norman J. Singer, 2A SUTHERLAND STATUTORY CONSTRUCTION, 6th Ed. § 47.25 (West 2000 & Supp. 2005). Like penal statutes, deportation statutes are to be literally and strictly construed. *See INS v. Cardoza-Fonseca*, 480 U.S. at 449, 107 S. Ct. 1207, 94 L. Ed. 2d at 459.

Here, the specific phrase "loss to the Government," included in section (M)(i) of the statute, governs the meaning of the more general phrase "loss to the victim or victims" by excluding the Government as a victim of an offense involving fraud or deceit for aggravated felony purposes, unless the offense is for tax evasion. *See, e.g., Ki Se Le v. Ashcroft*, 368 F.3d 218 at 226 (Alito, J., dissenting).

In *Ki Se Le v. Ashcroft*, the United States Court of Appeals for the Third Circuit held that tax crimes other than tax evasion cannot be considered to be aggravated felonies under INA § 101(a)(43)(M)(i), 8 U.S.C. § 1101(a)(43)(M)(i). As Judge Alito,

stated in dissent, "[i]n order to argue that the filing of a false income tax return does not come within the language of subsection (M)(i), one would have to argue either that the term 'victim' was not meant to apply to the Treasury"—that is, the Government—"or that the term 'loss' does not include a tax loss." 368 F.3d at 226. Judge Alito's opinion grasps the point precisely, stating succinctly the only meaning the majority's holding could have reasonably had. *See also United States v. Ekanem*, 383 F.3d 40, 42-43 (2d Cir. 2004) (finding that the Dictionary Act, 1 U.S.C. § 1, controls the meaning of the term "victim" unless the context of the statute at issue indicates otherwise).

The Eleventh Circuit erroneously reasoned that Congress would have used the term "persons" in 8 U.S.C. § 1101(a)(43)(M)(i) rather than the "broader term 'victim'" if it had "wanted to limit the definition of 'aggravated felony' to crimes in the victims were persons and corporate entities." *Balogun v. U.S. Attorney General*, 425 F.3d 1356, 1361 (11th Cir. 2005). That court's decision misinterprets section 101(a)(43)(M)(i) of the INA, 8 U.S.C. § 1101(a)(43)(M)(i). It contradicts both the plain meaning of the statute's language and Congress' intended meaning, which can be seen by applying ordinary tools of statutory construction.

In finding reasonable the BIA's interpretation of the term "victim," the court below put the cart before the horse. The plain meaning of the word "victim" and Congress' meaning, as seen through ordinary tools of statutory construction, indicates that Congress intended for tax evasion to be the only crime against a sovereign that could be considered an "aggravated felony."[1] Since Petitioner's conviction was not for tax evasion, he cannot be held to have caused a loss to a victim in excess of $10,000. He cannot be considered to be an aggravated felon. Thus, the court below erred in refusing to grant Petitioner's petition for review, which would have sent the case back to the BIA for it to order a new removal hearing at which Petitioner could have sought relief from removal.

The Eleventh Circuit's decision places it at odds with its own case law, that of this Court and that of its sister circuits. *See Sierra Club v. Martin*, 110 F.3d 1551, 1555 (11th Cir. 1997) (holding that

[1] This is not to say that an offense involving fraud or deceit committed against a sovereign cannot form the basis for a charge of inadmissibility or deportability. It merely means that a conviction for such an offense cannot be considered to be an aggravated felony.

the U.S. cannot prosecute a federal agency because the sovereign is not a person); *Ki Se Le v. Ashcroft*, 368 F.3d 218, 226 (3d Cir. 2004) (Alito, J., dissenting) (stating that to hold that the filing of a false income tax return does not fall under INA § 101(a)(43)(M)(i), one must argue that the term "victim" was not meant to apply to the government); *Virginia Office for Protection and Advocacy v. Reinhard*, 405 F.3d 185, 189 (4th Cir. 2005) (holding that a state sovereign cannot be sued under § 1983 because the sovereign is not a person and noting that the presumption that "person" does not include the sovereign may only be overcome by an "affirmative showing of statutory intent to the contrary); *United States v. Belgarde*, 300 F.3d 1177, 1181 (9th Cir. 2002) (dismissing a burglary indictment because a government entity may not be a victim since it is not a person); *United States v. Errol D.*, 292 F.3d 1159, 1162-64 (9th Cir. 2002) (same); *see also Rowland v. California Men's Colony*, 506 U.S. 194, 121 L. Ed. 2d 656, 113 S. Ct. 716 (1993) (stating that context under 1 U.S.C. § 1 is a narrow term referring to the words around the operative term and that context does not include legislative history); *United States v. United Mine Workers of America*, 330 U.S. 258, 91 L. Ed. 884, 67 S. Ct. 677 (1947) (stating that in common usage the term persons does not include the sovereign); *but see Abreu-Reyes v. INS*, 292 F.3d 1029, 1034 (9th Cir. 2002) (assuming that the U.S. Treasury can be a victim under INA § 101(a)(43)(M)(i), 8 U.S.C. § 1101(a)(43)(M)(i)).

In addition, the decision of the court below also accords the BIA far too much deference in its interpretation of the statutory language at issue. *INS v. Cardoza-Fonseca*, 480 U.S. at 446-48, 107 S. Ct. 1207, 94 L. Ed. 2d at 457-58 (holding that the judiciary is the final authority on issues of statutory construction and that a court must give effect to the intent of Congress it may ascertain using traditional tools of statutory construction). The principles of statutory construction in the area of immigration law require the courts to resolve any doubts or ambiguities in deportation statutes in favor of the alien. *INS v. Cardoza-Fonseca*, 480 U.S. at 449, 107 S. Ct. 1207, 94 L. Ed. 2d at 458-59; *Costello v. INS*, 376 U.S. at 128, 84 S. Ct. 580, 11 L. Ed. 2d 559. Beyond even that principle, no deference is due to a position of the BIA where the meaning of the statute can be divined from its text and meaning using ordinary tools of statutory construction. *INS v. Cardoza-Fonseca*, 480 U.S. at 449, 107 S. Ct. 1207, 94 L. Ed. 2d at 458-59.

As can be seen from the discussion above, the term "victim," as used in section 101(a)(43)(M)(i) of the INA, 8 U.S.C. § 1101(a)(43)(M)(i), refers to a person and was meant to exclude the Government.

Because the court below grossly misinterpreted the meaning of the term victim, placing it at odds with the law of this Court, the INA, the Dictionary Act, its sister circuits and its own case law, this Court should exercise its supervisory powers and grant Petitioner's Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

II. By Holding that the "Pardon Waiver" Codified at Section 237(a)(2)(A)(v) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(v), Can Never Be Effective in Inadmissibility Proceedings, the Court Below Erroneously Ignored Over Fifty Years of Agency Precedent and Violated Petitioner's Equal Protection Rights

The court's holding below that the "pardon waiver" codified at INA § 237(a)(2)(A)(v), 8 U.S.C. § 1227(a)(2)(A)(v), can never be effective for aliens charged as being inadmissible (i.e., excludable) in removal proceedings violates Petitioner's right to receive the equal protection of the laws, is contrary to more than fifty years of BIA precedent, and fails to take the interrelationship between the INA's inadmissibility and deportability provisions into account.

Aliens in deportation proceedings are entitled to equal protection under the Fifth Amendment to the Constitution of the United States. *Yick Wo v. Hopkins*, 118 U.S. 356, 368-69, 6 S. Ct. 1064, 30 L. Ed. 220, 226 (1886); *Yeung v. INS*, 76 F.3d 337, 339 (11th Cir. 1995); *Francis v. INS*, 532 F.2d 268, 272 (2d Cir. 1976). This Court reviews such claims using the rational basis test. *Francis v. INS*, 532 F.2d at 272. Under that test, distinctions between different classes of persons under that test "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Id.* (citing *Stanton v. Stanton*, 421 U.S. 7, 14, 95 S. Ct. 1373, 1377, 43 L. Ed. 2d 688, 694 (1975) and *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415, 40 S. Ct. 560, 561, 64 L. Ed. 989, 990 (1920)). "Fundamental fairness dictates that permanent resident aliens who are in like circumstances, but for

irrelevant and fortuitous factors, be treated in a like manner." *Francis v. INS*, 532 F.2d at 273.

Petitioner is in a class of pardoned permanent resident aliens who will be treated differently based solely on the "irrelevant and fortuitous" factor of whether they had traveled outside the United States before being placed into removal proceedings.

For over fifty years, the BIA has followed the rule that there is "no sound basis in logic or in reason to hold that [the] pardoning forgiveness or immunity applies to an alien who is" deportable and not to one who is excludable. *Matter of H—*, 6 I. & N. Dec. 90, 96 (BIA 1954); "What constitutes a full and unconditional executive pardon under § 241(b) of Immigration and Nationality Act of 1952 (8 USCS § 1251(b)), excepting certain pardoned aliens from deportation for crimes involving moral turpitude," 101 A.L.R. Fed. 668 (1991). "To adopt such a construction would in effect negate a clearly expressed congressional intent to immunize the pardoned criminal from the consequences of his criminal act." *Matter of H—*, 6 I. & N. Dec. at 96.

And yet, that is precisely what the Eleventh Circuit's decision does. It defies logic and reason, treating aliens who have been pardoned for criminal offenses differently based on the "irrelevant and fortuitous" factor of whether the pardoned alien had traveled outside the United States.

In *Matter of H—*, the BIA faced a case with facts strikingly similar to those in this case. The respondent, a Canadian citizen, was initially admitted as a permanent resident in 1912. She pleaded guilty in 1931 to a crime involving moral turpitude. Thereafter, she traveled to Canada and came back to the U.S. as a returning resident in 1943. The INS later placed her into proceedings, charging her with having been inadmissible at entry when she returned to the United States in 1943.

While her immigration proceedings were pending, the Governor of Massachusetts granted the respondent a full and unconditional pardon. Following her pardon, the respondent sought to have her immigration proceedings terminated. The INS opposed her motion because, it said, the pardon waiver only applied to the deportation grounds codified at then-section 241(a)(4) of the Immigration and Nationality Act.

Rejecting the INS's argument, the BIA held that pardons are equally as effective in exclusion proceedings, as in expulsion—or

deportation---proceedings. *Id.* As long as there is "a full and unconditional pardon granted by the President or by a Governor of a State," the BIA said, "the immunizing feature of the pardon applies." *Id.* The BIA reasoned:

> There is no sound basis in logic or in reason to hold that this pardoning forgiveness or immunity applies to an alien who has been convicted of a crime involving moral turpitude within 5 years after entry, and not to the case of the instant respondent, who has resided in this country since 1912 and who committed a crime prior to her last entry as a returning resident in 1943. To adopt such a construction would in effect negate a clearly expressed congressional intent to immunize the pardoned criminal from the consequences of his criminal act.

Id. Thus, the BIA concluded that the INA's pardoning provision includes not only the criminal who is deportable, but also the criminal who is excludable.

Dr. Balogun was first admitted as a permanent resident in 1968. He was convicted of a crime involving moral turpitude in 1988, following which he traveled, in 2002, outside the United States. He was placed in removal proceedings in which he was charged as being inadmissible. During those proceedings, Alabama Board of Pardons and Paroles granted him a full and unconditional pardon.

There is no difference between Dr. Balogun's case and that of the respondent in *Matter of H—*, and it would appear that the Eleventh Circuit rendered its decision without considering the agency's precedent on the matter.[2] In doing so, the court below departed from the accepted and usual course of judicial proceedings.

The court below also failed to consider that Dr. Balogun's pardon relieved him from the consequences of his conviction. The panel incorrectly assumed that Dr. Balogun would, in all cases, remain inadmissible even if Dr. Balogun's pardon was effective.

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[2] The Court of Appeals raised this issue *sua sponte* at oral argument. Neither the Government nor the Petitioner had addressed the issue in their briefs, and each apparently assumed, as the Immigration Judge did, that a pardon ought to apply as efficaciously in inadmissibility proceedings as in deportability proceedings.

Dr. Balogun's pardon, because it was issued after he fully satisfied the terms of his sentence, was full and unconditional. It effectively relieved him from the consequences of his federal conviction, notwithstanding the fact that the pardon was issued by the State of Alabama. As a result, Dr. Balogun was—and is—admissible, without even the need to apply for an inadmissibility waiver under INA § 212(h), 8 U.S.C. § 1182(h).

In *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 380-81, 18 L. Ed. 366, 371 (1867), this Court discussed the "effect and operation of a pardon," stating:

> A pardon reaches both the punishment prescribed for the offense and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense. If granted before the conviction, it prevents any of the penalties and disabilities, consequent upon conviction, from attaching; if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity.

Id.; see also Matter of Nolan, 19 I. & N. Dec. 539, 541 (BIA 1988) (stating "By definition, a pardon is an act of grace and mercy by which an offender is released from all the legal consequences flowing from his criminal conviction" and quoting *Garland* for the proposition that a pardon "blots out of existence the guilt" of the offender). The word "pardon" in "common parlance" means "[f]orgiveness for an offense, whether it be one for which the person committing it is liable in law or otherwise." *Ex parte Wells*, 59 U.S. (18 How.) 307, 309, 15 L. Ed 421, 423 (1855). As noted by Justice Holmes, writing for the Court in *Biddle v. Pervovich*, a pardon when granted "is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed ... . So far as a pardon legitimately cuts down a penalty, it affects the judgment imposing it." *Biddle v. Pervovich*, 274 U.S. 480, 486, 71 L. Ed. 1161, 1163 (1927).

While the chief executive of a state cannot take away the corporal punishment inflicted on an offender, he may nevertheless

grant a full and unconditional pardon to an offender following the satisfaction of his fine and sentence. *See, e.g., Hogan v. Hartwell*, 7 So.2d 889, 890-92 (Ala. 1942) (holding that an offender's "full and unconditional pardon" by the State Board of Pardons and Paroles following the expiration of the offender's sentence blots out of existence the offender's guilt and restores the "customary civil rights which ordinarily belong to a citizen" that his federal conviction had deprived him of); *Ex parte Casey*, 852 So.2d 175, 181 (Ala. 2002) (readopting *Hogan v. Hartwell* and holding that a pardoned offense cannot be used to enhance a defendant's sentence under Alabama's Habitual Felony Offender Act because a pardon blots out of existence the offender's guilt); *United States v. Swanson*, 947 F.2d 914, 918 (11th Cir. 1991) (holding that, under Alabama law, a pardon without express limitations nullifies "any and all legal incapacities, including the right to possess firearms"); *State ex rel. Dean v. Haubrich*, 248 Iowa 978, 83 N.W.2d 451 (1957); *Arnett v. Stumbo*, 287 Ky. 433, 153 S.W.2d 889 (1941). This is true whether the offense pardoned was a state or federal one. *Hogan v. Hartwell*, 7 So.2d 889, 891 (Ala. 1942); *State ex rel. Dean v. Haubrich*, 248 Iowa 978, 83 N.W.2d 451 (1957); *Arnett v. Stumbo*, 287 Ky. 433, 153 S.W.2d 889 (1941).

A person who has been pardoned following the satisfaction of his sentence, may not be punished again for that offense in any way. *Carlesi v. New York*, 233 U.S. 51, 57, 34 S. Ct. 576, 58 L. Ed. 843, 849 (1914); *Yasak v. Retirement Bd. of Policemen's Annuity and Benefit Fund of Chicago*, 357 F.3d 677, 679 (7th Cir. 2004); *see also United States v. Swanson*, 947 F.2d 914, 918 (11th Cir. 1991). Removal of a lawful permanent resident from this country is punishment; it is the "forfeiture for misconduct of a residence in this country." *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10, 68 S. Ct. 374, 92 L. Ed. 433, 436 (1948); *see also Costello v. INS*, 376 U.S. 120, 128, 84 S. Ct. 580, 11 L. Ed.2d 559 (1963). Thus, a finding of inadmissibility or an order of removal following a pardon is an impermissible punishment prohibited by logic and the Constitution of the United States.

Because Dr. Balogun had completely satisfied his sentence when the Alabama State Board of Pardons and Paroles granted him a full and unconditional pardon for his federal offenses, his pardon blotted out the existence of his guilt, making him "in the eyes of the law ... as innocent as if he had never committed the offense." *Ex parte*

Garland, 71 U.S. (4 Wall.) at 380-81, 18 L. Ed. at 371. He cannot be punished in any way, as through removal or a finding of inadmissibility, for the offense for which he was pardoned. As a result, the Eleventh Circuit's conclusion that "even assuming that [Dr.] Balogun's pardon meets the requirements of § 1227(a)(2)(A)(v), he would still be unable to enter the United States; he would still be removable" was drawn in error.

In addition, even assuming that a pardon does not make an alien admissible by its own operation, Dr. Balogun's pardon made him eligible for a waiver of his inadmissibility grounds under INA § 212(h), 8 U.S.C. § 1182(h). If granted, such a waiver would have made Dr. Balogun admissible.

An IJ or the BIA may grant a section 212(h) waiver to cure a ground of inadmissibility in removal proceedings seeking an alien's exclusion so long as the alien has been a permanent resident for seven years and has not been convicted of an aggravated felony. INA § 212(h), 8 U.S.C. § 1182(h); *Matter of Millard*, 11 I. & N. Dec. 175, 177 (BIA 1975); *see also Yeung v. INS*, 76 F.3d 337, 341 (11th Cir. 1995) (finding an equal protection violation where the BIA denied an alien who had never left the U.S. a chance to apply for a 212(h) waiver).

The pardon waiver contained in INA § 237(a)(2)(A)(v), 8 U.S.C. § 1227(a)(2)(A)(v), specifically relieves an alien from the consequences of an aggravated felony conviction, which is a deportability ground enumerated in INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii). To give the pardon any effect and to avoid imposing the punishment of banishment on the alien for the pardoned offense, Dr. Balogun should have been given the chance to apply for a § 212(h) waiver. The failure to do so created an impermissible and illogical difference between classes of aliens, for a pardoned aggravated felon in deportation proceedings may seek a waiver under the Eleventh Circuit's holding, whereas he cannot if he has traveled outside the United States and has been charged with being inadmissible upon attempting to reenter.

WHEREFORE, for the foregoing reasons, Petitioner respectfully requests that this Court grant his Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

ORDERS AND DECISIONS
FROM THE
PROCEEDINGS BELOW

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 04-12507-II & 04-14496-II

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
DEC 20 2005
THOMAS K. KAHN
CLERK

PETER BALOGUN,

Petitioner,

versus

U.S. ATTORNEY GENERAL,

Respondent.

Petition for Review of an Order of the
Board of Immigration Appeals

Before: BIRCH, CARNES and FAY, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Ed Carnes
UNITED STATES CIRCUIT JUDGE

ORD-42
(6/95)

United States Court of Appeals
For the Eleventh Circuit

Nos. 04-12507 and 04-14496

Agency No.
A11-850-952

FILED
U.S. COURT OF
APPEALS
ELEVENTH
CIRCUIT

September 26, 2005
THOMAS K. KAHN

CLERK

PETER BALOGUN,

Petitioner,

versus

U.S. ATTORNEY GENERAL,

Respondent.

Petitions for Review of a Decision of the
Board of Immigration Appeals

JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered: September 26, 2005
For the Court: Thomas K. Kahn, Clerk
By: Gilman, Nancy

ISSUED AS MANDATE

DEC 29 2005

U.S. COURT OF APPEALS
ATLANTA, GA.

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
September 26, 2005
THOMAS K. KAHN
CLERK

Nos. 04-12507, 04-14496

Agency No. A11-850-952

PETER BALOGUN,

Petitioner,

versus

U.S. ATTORNEY GENERAL,

Respondent.

Petitions for Review of Decisions of the
Board of Immigration Appeals

(September 26, 2005)

Before BIRCH, CARNES and FAY, Circuit Judges.

CARNES, Circuit Judge:

Peter Balogun petitions for review of the Board of Immigration Appeals' order affirming the immigration judge's decision to deny him relief from removal, and for review of the BIA's order refusing to reopen his removal proceedings. We deny the petitions.

I.

Balogun, a citizen of Nigeria, entered the United States in 1960 as a student and his status was later adjusted to lawful permanent resident. In 1988 Balogun was convicted in federal district court in Alabama on one count of embezzling and one count of conspiring to embezzle more than $ 10,000 from the United States government. He was sentenced to fifteen months in federal prison on each count, to be served concurrently.

In 1997 the state of Alabama granted Balogun's request for a pardon. The pardon restored some of Balogun's civil and political rights and withheld others. Specifically excluded from the pardon was the right to own or possess a firearm. The pardon also stated that Balogun would be subject to the state's habitual offender act if he committed subsequent crimes.

At some point between 1997 and 2002, Balogun left the country. He returned on October 28, 2002, seeking to be admitted to the United States as a returning resident. The Immigration and Naturalization Service charged Balogun with removability because, as an alien who had committed a crime of moral turpitude, he was "inadmissible" or "ineligible to be admitted to the United States." See 8 U.S.C. § 1182(a)(2)(A)(i)(I).

Balogun conceded that he was removable but argued that his "inadmissible" status should be waived for three reasons: (1) the crime he committed occurred more than fifteen years before his application for admission to the United States; (2) his four children are United States citizens who would suffer extreme hardship were he not admitted; and (3) he had been pardoned for his crime. The IJ rejected each of those stated grounds.

The IJ concluded that the fifteen-year-waiver provision, id. § 1182(h)(1)(A)(i), and the children-citizen-waiver provision, id. § 1182(h)(1)(B), were inapplicable to Balogun. Those provisions do not permit a waiver of inadmissibility if "an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence" has "since the date of such admission . . . been convicted of an aggravated felony." Id. § 1182(h). The IJ found that Balogun's embezzlement convictions were aggravated felonies for the purposes of § 1182(h). In addition, the IJ held that Balogun's pardon was not "full and unconditional" as required by the pardon-waiver provision. Id. § 1227(a)(2)(A)(v). The pardon restricted

Balogun's right to own and possess a firearm and stated that his conviction was subject to the habitual offender act.

The BIA affirmed the IJ's decision and adopted his reasoning as its own. Balogun petitioned this Court to review the BIA's order affirming the IJ's decision to deny him relief from removal.

Shortly after Balogun petitioned this Court for review, he filed a motion with the BIA to reopen his removal proceedings based on new facts not available at the time of the original decision. See 8 C.F.R. § 1003.2(c)(1). Seven days after Balogun received the BIA's order affirming the IJ's decision, he received a pardon from the state of Alabama restoring without exception all the state civil and political rights that he had lost as a result of his federal embezzlement convictions. Balogun asserted in his motion to reopen that, because this new pardon was now "full and unconditional," he was entitled to have his inadmissible status waived under 8 U.S.C. § 1227(a)(2)(A)(v).

The BIA denied the motion to reopen. It held that the new pardon was not "full and unconditional" as required by § 1227(a)(2)(A)(v). The BIA explained that the pardon did not release Balogun from "all legal consequences flowing from his federal criminal convictions," specifically those consequences imposed under federal, rather than state, law. Balogun petitioned this Court to review the BIA's order on his motion to reopen, as well.

We have consolidated Balogun's petitions for the purposes of this appeal.

II.

Regarding his initial petition for review of the BIA's final order of removal, Balogun contends that he did not commit an "aggravated felony" disqualifying him from having his "inadmissible" status waived. A felony is only "aggravated" under the statute, Balogun says, when it is committed against a person or corporate entity. Crimes committed against the United States, on the other hand, cannot be aggravated felonies, because the United States is not considered a "victim" under the statute. We do not agree.

An alien may not enter the United States if he has committed a crime of moral turpitude. 8 U.S.C. § 1182(a)(2)(A)(i)(I). The alien's inadmissible status may be waived at the discretion of the Attorney General if "the activities for which the alien is inadmissible occurred

more than 15 years before the date of the alien's application for . . . admission." Id. § 1182(h)(1)(A)(i). The alien's inadmissible status may also be waived by the Attorney General if the alien is a "parent . . . of a citizen of the United States" and the "denial of admission would result in extreme hardship to the United States citizen . . . son, or daughter." Id. § 1182(h)(1)(B). The Attorney General, however, lacks discretion to waive an alien's inadmissible status if the alien committed an "aggravated felony" during a time when he was previously in the United States as a lawful permanent resident. Id. § 1182(h).

The BIA, adopting the IJ's decision, found that because Balogun's embezzlement convictions were aggravated felonies the Attorney General had no discretion to waive Balogun's inadmissible status. As a result, the BIA concluded that Balogun remained inadmissible and was due to be removed from the United States.

Before May 11, 2005, our review of this decision would have been limited. Section 1252(a)(2)(C) of the immigration statutes provides that "no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2)." 8 U.S.C. § 1252(a)(2)(C). (Balogun committed a criminal offense covered in section 1182(a)(2), i.e., a crime of moral turpitude. See id. § 1182(a)(2)(A)(i)(I).) We had held that, where a final order of removal may be subject to the jurisdictional restraints of section 1252(a)(2)(C), our review is limited to determining whether the petitioner is (1) an alien (2) who was removable (3) for committing a crime enumerated in one of the statutes listed in section 1252(a)(2)(C). Galindo-Del Valle v. Attorney Gen., 213 F.3d 594, 598 (11th Cir. 2000) (per curiam). If all three of those conditions exist, and there are no constitutional defects in the alien's removal proceedings, we must dismiss the petition for want of jurisdiction. Id. That is the framework that would have applied here. Balogun has conceded that he is an alien, that he is removable, and that he committed a crime of moral turpitude. He has not claimed that he was deprived of a constitutional right. Balogun's question of law about whether the BIA erred in determining that his embezzlement convictions were aggravated felonies would have been beyond the scope of our jurisdiction.

That all changed on May 11, 2005 when the President signed into law the Emergency Supplemental Appropriations Act for Defense,

the Global War on Terror, and Tsunami Relief, Pub. L. No. 109-13, 119 Stat. 310 (2005). That appropriations act contains an unrelated, but important, division titled the "REAL ID Act." One of the provisions in the REAL ID Act loosened the jurisdictional restraints of section 1252(a)(2)(C). It has the effect of restoring some of our jurisdiction to decide the "questions of law" an alien raises in a petition to review a final order of removal. Specifically, the REAL ID Act provides:

> Nothing in [section 1252(a)(2)(C)], or in any other provision of this Act (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

Real ID Act § 106(a)(1)(A)(iii), codified at 8 U.S.C. § 1252(a)(2)(D).

Congress explained that it added section 106(a)(1)(A)(iii) to "eliminate the problems of bifurcated and piecemeal litigation." 151 Cong. Rec. H2813 (conference report for Emergency Supplemental Appropriations Act). As we explained above, before May 11, 2005, we were without jurisdiction to review questions of law raised in an alien's petition for review where the alien committed a crime enumerated in one of statutes listed in 8 U.S.C. § 1252(a)(2)(C). To get around this jurisdictional bar, aliens would petition a federal district court for a writ of habeas corpus under 28 U.S.C. § 2241(a) to get some review of the purported legal error in the BIA's removal order. The Supreme Court said in INS v. St. Cyr, 533 U.S. 289, 121 S. Ct. 2271, 150 L. Ed. 2d 347 (2001), that habeas review of the BIA's alleged error was not precluded by the jurisdiction stripping statute in 8 U.S.C. § 1252(a)(2)(C).

In effect, the St. Cyr decision gave aliens who had committed crimes "more judicial review than non-criminals." 151 Cong. Rec. H2813. In other words, aliens who had not committed crimes only had one opportunity to appeal the final removal order of the BIA, but aliens who had committed a crime listed in one of the enumerated statutes in section 1252(a)(2)(C) had two opportunities--first a petition for review to the courts of appeals on the final order of

removal, and then a petition for habeas corpus under 28 U.S.C. § 2241(a) to the federal district court. Congress found that this double-layered review for criminal aliens prolonged and complicated the removal process. See 151 Cong. Rec. H2813.

Section 106(a)(1)(A)(iii) of the REAL ID Act replaces the two levels of review with one. A criminal alien now must petition the court of appeals for review of all claimed legal errors relating to the BIA's final order of removal. The Act accomplished this by restoring the courts of appeals' jurisdiction to review all legal errors in a removal order for criminal aliens. Habeas review became unnecessary. The provisions of 28 U.S.C. § 2241(a) no longer play any role in immigration cases. See 151 Cong. Rec. H2813 ("By placing all review in the courts of appeals, Division B [i.e., the Real ID Act] would provide an 'adequate and effective' alternative to habeas corpus."). These jurisdiction restructuring provisions are retroactively applicable to all pending proceedings regardless of the date of the final administrative order. The REAL ID Act § 106(b); Fernandez-Ruiz v. Gonzales, 410 F.3d 585, 587 (9th Cir. 2005).

Our conclusion that we have jurisdiction to decide in a petition for review proceeding whether the BIA erred in determining that a petitioner's conviction is an aggravated felony within the meaning of 8 U.S.C. § 1182(h) is consistent with that of every other court of appeals that has addressed the issue. See Popal v. Gonzales, 416 F.3d 249, 251-52 (3d Cir. 2005); Elia v. Gonzales, 418 F.3d 667, 671 (6th Cir. 2005); Gattem v. Gonzales, 412 F.3d 758, 762-63 (7th Cir. 2005); Lopez v. Gonzales, 417 F.3d 934, 936 (8th Cir. 2005); Fernandez-Ruiz v. Gonzales, 410 F.3d 585, 587 (9th Cir. 2005). We turn now to the specific question of whether Balogun's embezzlement conviction is an aggravated felony for § 1182(h) purposes.

An alien commits an "aggravated felony" if his offense "involves fraud or deceit in which the loss to the victim or victims exceed $ 10,000." 8 U.S.C. § 1101(a)(43)(M)(i). Balogun concedes that his embezzlement conviction involved a fraud of more than $ 10,000. He argues, however, that because he defrauded the United States government, rather than a "person," his embezzlement conviction did not involve a victim. If they did not, Balogun reasons, he could not have committed an "aggravated felony" as defined by the immigration statutes.

As support, Balogun points to 8 U.S.C. § 1101(a)(43)(M)(ii), the provision immediately following the definition of "aggravated felony." That provision specifies that an alien commits an "aggravated felony" if he was convicted of tax evasion that resulted in a loss to the United States government of more than $ 10,000. Id. Balogun's point is that Congress specifically referred to the United States government as a victim in subparagraph (ii) of its definition of "aggravated felony," but in subparagraph (i) referred only to "victims" generally. From that he would have us infer that the United States government is not included in "victim" as that term is used in subparagraph (i) of section 1101(a)(43)(M).

Balogun's argument ignores the obvious point that it would not have made any sense for Congress to use the broader term "victim," which includes individuals and corporate entities, in subparagraph (ii); only the government can be victimized by tax evasion which is all that subparagraph (ii) addresses. In contrast, the victims of fraud or deceit generally, which is what subparagraph (i) addresses, can include an individual, a corporate entity, or the government. That is why Congress used the inclusive term "victim" in subparagraph (i) while it specified the government as the victim in subparagraph (ii). If Congress had wanted to limit the definition of "aggravated felony" to crimes in which the victims were persons and corporate entities, as Balogun suggests, it could have used the term "persons" in section 1101(a)(43)(M)(i). Instead, Congress used the broader term "victim."

This interpretation comports with the way courts have interpreted the term "victim" in other statutory contexts. The Second Circuit has held that the Internal Revenue Service can be a "victim" for restitution purposes under the Victim and Witness Protection Act, 18 U.S.C. § 3663. See United States v. Helmsley, 941 F.2d 71, 101-02 (2d Cir. 1991) (listing cases where government agencies have been found to be victims). The same court has held that, under the Mandatory Victims' Restitution Act, the government is a victim entitled to restitution for embezzlement (the same crime for which Balogun was convicted). See United States v. Ekanem, 383 F.3d 40, 43-44 (2d Cir. 2004). Likewise, the Ninth Circuit has held that the Postal Service was a "victim" entitled to restitution under the same act. See United States v. De La Fuente, 353 F.3d 766, 773-74 (9th Cir. 2003).

In this case the BIA interpreted "victim" in 8 U.S.C. § 1101(a)(43)(M)(i) to include the government, and its interpretations

of immigration statutes are due Chevron deference where appropriate. Farquharson v. United States AG, 246 F.3d 1317, 1320 (11th Cir. 2001); Perlera-Escobar v. Executive Office for Immigration, 894 F.2d 1292, 1296 (11th Cir. 1990) ("We are also obliged . . . to defer to the BIA's interpretation of the applicable statute if that interpretation is reasonable." (citing Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984)). Giving Balogun's argument the benefit of the doubt, the most that can be said is that the term "victim" in § 1101(a)(43)(M)(i) is ambiguous. The BIA's interpretation of it to include the government is reasonable.

Given that conclusion and Balogun's concession that his embezzlement conviction involved a fraud of more than $ 10,000, it follows that his conviction was for an aggravated felony within the meaning of 8 U.S.C. § 1101(a)(43)(M)(i). As a result, Balogun is not entitled to a waiver of his inadmissible status under 8 U.S.C. § 1182(h). The BIA's order of removal is valid, and Balogun's petition for review of that order is due to be denied.

III.

The other issue Balogun raises concerns his petition for review of the BIA's order declining to reopen his removal proceedings. Balogun contends that his motion to reopen should have been granted because, six days after the BIA issued its final order of removal, the state of Alabama granted him an unconditional pardon--as opposed to the limited pardon he had previously received--for his federal embezzlement convictions.

The BIA is permitted to reopen removal proceedings if the alien, within ninety days of the final order of removal, presents new evidence that "is material and was not available and could not have been discovered or presented at the former hearing." 8 C.F.R. § 1003.2(c)(1). Balogun's motion to reopen the removal proceedings was timely filed and he did present new evidence which was not available at his former hearing. The question is whether this new evidence is material to the BIA's final order of removal.

Balogun argues that he is entitled to a waiver of his inadmissible status under 8 U.S.C. § 1227(a)(2)(A)(v) because he "has been granted a full and unconditional pardon . . . by the Governor of any of the several States." The government responds that Balogun's new

pardon is not "full and unconditional" because, while all his civil and political rights under state law were restored, he is still subject to the federal consequences of his federal embezzlement convictions (for example, federal felon in possession laws and federal habitual offender laws). Although we are inclined to agree with the BIA, we need not decide what Congress intended by "full and unconditional pardon" because Balogun is ineligible for the pardon-waiver provision of section 1227(a)(2)(A)(v) in any event.

An alien is to be deported if he is convicted, while in the United States, of the crimes listed in section 1227(a)(2)(A)(i) through (iv). Section 1227(a)(2)(A)(v) provides that subparagraphs (i) through (iv) "shall not apply" if an alien who has been convicted of one of the listed crimes has been pardoned by the president or a governor of a state. Notably, section 1227(a)(2)(A) governs only those aliens who are deportable.

Balogun is not a deportable alien. He is an inadmissible alien under section 1182(a)(2)(A)(i)(I), a wholly different provision authorizing his removal. This separate classification of inadmissibility applies to those aliens who, for one reason or another, are ineligible to enter or re-enter the United States in the first place. See 8 U.S.C. § 1182(a). (This ineligibility to enter the country contrasts with the situation of deportable aliens who are either (1) eligible to enter when they arrive and are admitted, but become ineligible to remain because of some later event, or (2) those who were admitted, but would not have been had their inadmissible status been known at the time of admission.) See id. § 1227(a)).

Section 1182 does not have a pardon provision like section 1227 does, and we believe that if Congress had intended to extend the pardon waiver to inadmissible aliens, it would have done so. "It is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another." BFP v. Resolution Trust Corp., 511 U.S. 531, 537, 114 S. Ct. 1757, 1761, 128 L. Ed. 2d 556, (1994) (citation and quotation marks omitted); accord In re Griffith, 206 F.3d 1389, 1394 (11th Cir. 2000) (en banc) (noting that "where Congress knows how to say something but chooses not to, its silence is controlling") (alteration in original) (quotation marks omitted). Thus, even assuming that Balogun's pardon meets the requirements of § 1227(a)(2)(A)(v), he would still be unable to enter the United States; he would still be removable.

IV.

We deny Balogun's petition for review of the BIA's final order of removal and his petition for review of the BIA's order deny his motion to reopen his removal proceedings.

PETITIONS DENIED.

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Suite 2450
Atlanta, GA 30308-0000

Office of the District Counsel/ATL
77 Forsyth St., Room 385
Atlanta, GA 30303

Name: BALOGUN, PETER A11-850-952

Date of this notice: 08/20/2004

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

/s/

Frank Krider
Acting Chief Clerk

Enclosure

Panel Members:
HOLMES, DAVID B.

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, VA 22041

File: A11 850 952 – Atlanta Date: AUG 23 2004

In re: PETER G. BALOGUN

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Carolina Colin-Antonini, Esquire

ON BEHALF OF DHS: Melanie E. Babb
Assistant Chief Counsel

CHARGE:

Notice: Sec. 212(a)(2)(A)(i)(1), I&N Act [8 U.S.C. § 1182(a)(2)(A)(i)(1)] – Crime involving moral turpitude

APPLICATION: Reopening

This matter was last before this Board on April 20, 2004, when we adopted and affirmed the decision of an Immigration Judge which denied the respondent's request for termination of proceedings, denied the respondent's applications for relief from removal, and ordered the respondent removed to Nigeria. The respondent has since filed a motion to reopen these removal proceedings. The motion is denied.

Initially, we find that the respondent's motion to reopen was filed in a timely manner. *See* 8 C.F.R. § 1003.2(c)(2). We further find that the respondent has provided new evidence that was previously unavailable at the former hearing. *See* 8 C.F.R. § 1003.2(c)(1).

However, while the respondent has offered a "Certificate of Pardon with Restoration of Civil and Political Rights" issued by the Alabama Board of Pardons and Paroles, the respondent was convicted of federal offenses in the United States District Court for the Middle District of Alabama. We do not find that the evidence or argument advanced with this motion adequately establishes that such a state pardon releases the respondent from all legal consequences flowing from his federal criminal convictions.

ORDER: The motion to reopen is denied.

/s/ David B. Holmes

FOR THE BOARD

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Atlanta, GA 30303

Name: BALOGUN, PETER A11-850-952

Date of this notice: 04/20/2004

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

/s/

Frank Krider
Acting Chief Clerk

Enclosure

Panel Members:
HOLMES, DAVID B.

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, VA 22041

File: A11 850 952 – Atlanta Date: APR 20 2004

In re: PETER G. BALOGUN

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Carolina Colin-Antonini, Esquire

ON BEHALF OF DHS: Melanie E. Babb
Assistant Chief Counsel

ORDER:

PER CURIAM. We adopt and affirm the decision of the Immigration Judge. *See Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994) (noting that adoption or affirmance of a decision of an Immigration Judge, in whole or in part, is "simply a statement that the Board's conclusions upon review of the record coincide with those which the Immigration Judge articulated in his or her decision.") We reject the respondent's argument that the term "victim" in section 101(a)(43)(M)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(M)(i), cannot include the United States, and do not find support for this argument in the different language used in section 101(a)(43)(M)(ii) given that the offense in this latter subsection is one described in the Internal Revenue Code. *See generally Abreu-Reyes*, 292 F.3d 1029, 1031 (9th Cir. 2001); *see also Moore v. Ashcroft*, 252 F.3d 919, 923 n.7 (11th Cir. 2001) (noting that a bank was the "victim" under section 101(a)(43)(M)(i)). Accordingly, the appeal is dismissed.

/s/ David B. Holmes
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
United States Immigration Court
77 Forsyth Street, Room 112
Atlanta, Georgia 30303

IN THE MATTER OF	)	IN REMOVAL PROCEEDINGS
	)	
BALOGUN, Peter	)	File No. A#11-850-952
	)	
Respondent	)	
	)	

CHARGE: Section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act [INA or Act], as amended, as an alien who has been convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime.

APPLICATIONS: Motion to Terminate Proceedings to Apply for Naturalization; Waiver of Inadmissibility pursuant to former INA § 212(c); Waiver of Inadmissibility pursuant to INA § 212(h).

APPEARANCES

ON BEHALF OF RESPONDENT:
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ON BEHALF OF DHS:
Assistant District Counsel
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Atlanta, GA 30303

DECISION AND ORDER

Respondent is a male, native of and citizen of Nigeria. He entered the United States sometime in 1960 as a student, and later adjusted

his status to that of a lawful permanent resident. On April 24, 1998, Respondent was convicted after a jury trial in the United States District Court for the Middle District of Alabama, for one count of Conspiracy to Embezzle Funds, in violation of 18 U.S.C. § 371, and one count of Embezzlement, in violation of Title 18 U.S.C. § 641. On July 18, 1988, Respondent was sentenced to fifteen months of imprisonment for each count, to be served concurrently. On April 29, 1997, the State of Alabama granted a pardon to Respondent.

On October 28, 2002, Respondent applied for entry into the United States as a returning resident. The Immigration and Naturalization Service[1] [DHS] determined that Respondent was applying for admission, pursuant to INA § 101(a)(13)(C), as a permanent resident who has committed an offense identified in INA § 212(a)(2). The DHS commenced proceedings against Respondent by filing a Notice to Appear (NTA) dated November 6, 2002, with this Court on November 21, 2002, charging Respondent as an arriving alien who is inadmissible as an alien who has been convicted of a crime involving moral turpitude, pursuant to INA § 212(a)(2)(A)(i)(I).

At a hearing on December 29, 2002, Respondent, through counsel, acknowledged receipt of the NTA, admitted the allegations of fact and conceded removability. As discussed below, the Court will find that the DHS has established removability by clear and convincing evidence. See 8 C.F.R. § 1240.8(a) (2003). As relief from removal, Respondent requested termination of removal pursuant to 8 C.F.R. § 239(f), a waiver of inadmissibility pursuant to former INA § 212(c), and a waiver of inadmissibility pursuant to INA § 212(h). Respondent indicated no fear of persecution or torture should he be returned to Nigeria. Moreover, as an arriving alien, he is ineligible for the relief of voluntary departure. INA §§ 240B(a)(4), (b)(1)(A).

After a careful review of the record and the submissions of both parties, the Court will find Respondent ineligible for termination of Proceedings pursuant to 8 C.F.R. § 239(f), a waiver of inadmissibility pursuant to former INA § 212(c), and a waiver of

[1] On March 1, 2003, the Immigration and Naturalization Service became part of the Department of Homeland Security. Homeland Security Act of 2002, Pub. L. No. 107-296, Title IV, 116 Stat. 2135 (Nov. 25, 2002), as amended.

inadmissibility pursuant to INA § 212(h). As Respondent has requested no further relief, the Court will order Respondent removed to Nigeria, his country of nationality.

LEGAL ANALYSIS

A. Admission and Inadmissibility

Under the INA, aliens lawfully admitted to the United States who seek to reenter the United States are not considered to be seeking admission unless they fall into one of six categories: an alien who has abandoned or relinquished his lawful permanent resident status; an alien who has been absent from the United States for a continuous period in excess of 180 days; an alien who has engaged in illegal activity after having departed the United States; an alien who departed the United States while under extradition, removal, or other proceedings seeking to remove the alien from the United States; an alien who has committed an offense listed in INA § 212(a)(2) without a subsequent waiver under the INA; and an alien who is attempting to enter the United States at a time or place other than as designated by immigration officers or has not been admitted to the Untied States after inspection and authorization by an immigration officer. INA § 101(a)(13(C). If deemed to be seeking admission, the applicant for admission is subject to the bars on admissibility enumerated in the INA. Matter of Collado, 21 I&N Dec. 1061 (BIA 1998).

Both parties agree that embezzlement, and conspiracy to embezzle, are crimes involving moral turpitude. Matter of Batten, 11 I&N Dec. 271 (BIA 1965). In a request for a bond hearing, Respondent argues that the conviction is no longer a conviction for immigration purposes due to the pardon he received from the State of Alabama in 1997.

A "full and unconditional" pardon by the President of the United States, a governor of a state or a constitutionally recognized body of a state will prevent removal on criminal grounds. INA § 212(a)(2)(A)(v); Matter of Nolan, 19 I&N Dec. 539 (BIA 1988). Such a pardon "must obliterate any future legal consequences flowing from the underlying adjudication of guilt. Matter of Nolan,

19 I&N Dec. at 541 (emphasis added). Similar to the pardon in Nolan, Respondent's pardon from Alabama "does not relieve the recipient from the effects of the Habitual Offender Act," nor does it restore the right to "ship, transport or possess firearms" or to won or possess a pistol. See Resp't's Motion for a Bond Hearing, Ex. G. Accordingly, Respondent's 1997 pardon is not a full pardon, and does not prevent removal pursuant to INA § 212(a)(2)(A)(i)(I).

As a result, the Court finds the Respondent is inadmissible pursuant to INA § 212(a)(2)(A)(i)(I), as charged in the NTA.

B. Motion to Terminate Proceedings to Allow Respondent to Petition for Naturalization

An Immigration Judge may terminate removal proceedings to permit a respondent to proceed to a final hearing on a pending application/petition for naturalization "when the alien has established prima facie eligibility for naturalization and the matter involves exceptionally appealing or humanitarian factors." 8 C.F.R. § 1239.2(f). Respondent's case does, indeed, involve exceptionally appealing factors. Nevertheless, Respondent cannot establish prima facie eligibility for naturalization.

This Court has no jurisdiction to examine the evidence and determine whether a respondent is eligible for naturalization. Matter of Cruz, 15 I&N Dec. 236 (BIA 1975). Jurisdiction over that determination rests with the Immigration and Naturalization Service and, once an application has been denied, with the federal district court having jurisdiction over the applicant. 8 C.F.R. § 1310.2; INA § 310(c). The Board held that "prima facie eligibility may be established by an affirmative communication from the Service or by a declaration of a [district] court that the alien would be eligible for naturalization but for the pendency of the deportation proceedings or the existence of an outstanding order of deportation." Matter of Cruz, *supra*, at 237.

In this case, neither Respondent nor the DHS have supplied such an affirmative communication. The record contains no indication that an petition has been filed with the DHS, a petition has been denied, or that an appeal of a denial was filed with the district court pursuant

to INA § 310(c). As such, Respondent has not established prima facie eligibility for naturalization. As a result, Respondent's motion to terminate proceedings pursuant to 8 C.F.R. § 1239.2(f) must be denied.

C. Section 212(c) Relief

Respondent indication that he would apply for a waiver of inadmissibility pursuant to former section 212(c). In 1996, Congress passed two laws which affected the availability of section 212(c) relief. The first law, the Antiterrorism and Effective Death Penalty Act of 1996 [AEDPA], Pub. L. No. 104-132, 110 Stat. 1214, narrowed the availability of section 212(c) relief by making those convicted of any aggravated felony, controlled substance violation, firearms violation and certain security-related crimes. AEDPA § 440(d) (1996).[2] The second law, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 [IIRIRA], Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, eliminated section 212(c) relief for those who were placed into proceedings on or after April 1, 1997. IIRIRA § 304(b).

After extensive litigation, however, the Supreme Court found that Congress had not clearly indicated its intent to make IIRIRA § 304(b) retroactive, and thus held that section 212(c) relief remains available for aliens whose convictions were obtained through plea agreements and who would have been eligible for section 212(c) relief "at the time of their plea under the law then in effect." INS v. St. Cyr, 533 U.S. 289, 326 (2001). The records of conviction indicate that Respondent was found guilty after a jury trial. Motion to Pretermit of December 23, 2002, Ex. 1. As such, Respondent is ineligible for a waiver of inadmissibility pursuant to former section 212(c).

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[2] AEDPA also expanded the list of crime considered to be aggravated felonies for immigration purposes, but the expanded definitions applied only to convictions entered on or after the enactment of AEDPA. AEDPA §§ 440(e), (f). However, Congress later made the expanded definition of aggravated felony applicable "regardless of whether the conviction was entered before, on, or after the date of the enactment of this paragraph." IIRAIRA 321(b); Matter of Truong, 22 I&N Dec. 1090 (BIA 1999).

D. Waiver of Inadmissibility Pursuant to INA § 212(h)

After 1991, tow categories of immigrants may be eligible for relief pursuant to section 212(h): those whose activity which resulted in the conviction occurred more that fifteen years before the date of application for the waiver, and those who can establish extreme hardship to a United States citizen or lawful permanent resident spouse, parent, son, or daughter. INA § 212(h). Respondent appears to be eligible under the fifteen-year clause, as the activities which led to his 1988 conviction occurred between March 12, 1982 and October 28, 1983, over fifteen years ago. See INA § 212(h)(1)(A). Additionally, Respondent may be able to establish the requisite family times, as he has asserted that his spouse and three children are United States citizens. See INA § 212(h)(1)(B).

In addition to the statutory requirements, there are also bars to eligibility added by IIRIRA. The amendments to section 212(h) added by IIRIRA apply to an alien in proceedings as of the date of enactment of IIRIRA.[3] IIRIRA § 348(a); Matter of Yeung, 21 I&N Dec. 610 (BIA 1998). No waiver may be granted to an alien who was previously in lawful permanent resident status if the alien has been convicted of an aggravated felony, or if the alien has not lawfully resided continuously for no less than seven years before the start of removal proceedings. INA § 212(h). Respondent is a lawful permanent resident with the required seven years of continuous residence. Thus, the Court must consider whether Respondent's conviction is an aggravated felony under the INA.

A conviction for an offense that "involves fraud or deceit in which the loss to the victim or victims exceeds $10,000" is a conviction for an aggravated felony. INA § 101(a)(43)(M)(i). IN addition, a conviction for an attempt or conspiracy to commit an offense described in INA 101(a0(43) is also an aggravated felony. INA 101(a)(43)(U). Respondent was convicted of embezzlement in violation of 18 U.S.C. § 641 and of conspiracy to embezzle funds, in violation of 18 U.S.C. § 371.

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[3] Congress stated that the amendment "shall be effective on the date of enactment of this Act and shall apply in the case of any alien who is in exclusion or deportation proceedings as of such a date unless a final administrative order in such proceedings has been entered as of such date." IIRIRA § 348(b).

18 U.S.C. § 641 reads:.

> Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or
> Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted—
> Shall be fined under this title …

Id. Although the statute is clearly divisible, the judgment clearly indicates that Respondent was convicted of embezzlement under the statute. Embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted or into whose hands it has lawfully come. Moore v. United States, 160 U.S. 268 (1895).

The Board of Immigration Appeals (BIA or Board) has not parsed the term "offense which involves fraud or deceit," but has found submission or a false claim with intent to defraud and insurance company falls under INA § 101(a)(43)(M). Matter of Onyido, 22 I&N Dec. 552 (BIA 1999). The Eleventh Circuit held that misappropriation of bank funds was an aggravated felony under INA § 101(a)(43)(M), because an element of the offense required "proof that the defendant knowingly participated in a deceptive or fraudulent transaction." Moore v. Ashcroft, 251 F.3d 919, 923 (11th Cir. 2001). As such, the Court finds that embezzlement is a crime involving fraud or deceit. The same analysis would apply to conspiracy to embezzle; thus, conspiracy to embezzle is also a crime involving fraud or deceit.

Under the INA, an conviction for an offense that involves fraud or deceit is an aggravated felony only where the loss to the victim or victims exceeds $10,000. INA § 101(a)(43)(M)(i). The DHS submitted a copy of the presentence report which states that the total loss to the victim was $101,881.16. Motion to Pretermit, Ex. 3.

Respondent that the presentence report does not establish the loss to the victim because the sentencing court did not order restitution. The Court notes that the sentencing court declined to enter an order restitution because such an order would unduly complicate and prolong the sentencing process, not because no restitution was due. Motion to Pretermit, Ex. 1. Moreover, "[any document or record prepared by, or under the direction of, the court in which the conviction was entered that indicates the existence of a conviction" may be used as evidence of a criminal conviction. 8 C.F.R. § 1003.41. A presentence report falls within this definition. See Abreu-Reyes v. INS, 292 F.3d 1029, 1032 (9th Cir. 2002). No other evidence in the record contradicts the amounts listed in the presentence report.[4] As a result, the Court finds that the total loss to the victim exceeded $10,000.

As Respondent has been convicted of a crime involving fraud or deceit, and the total loss to the victim or victims exceeded $10,000, the Court finds that Respondent has been convicted of an aggravated felony, pursuant to INA § 101(a)(43)(M)(i). Accordingly, he is ineligible to apply for a waiver of inadmissibility pursuant to INA § 212(h).

No applications for relief remain.

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[4] In removal proceedings where the respondent is an applicant for admission, the respondent bears the burden of establishing that he is "clearly and beyond doubt entitled to be admitted, and is not inadmissible under section 212. INA § 240(c)(2)(A); 8 C.F.R. § 1240.8(b). The respondent also bears the burden of establishing eligibility for any requested benefit or privilege and that it should be granted in the exercise of discretion. 8 C.F.R. §1240.8(d). If the evidence indicates that one or more of the grounds for mandatory denial of the application for relief may apply, the respondent bears the burden of establishing by a preponderance of the evidence that such grounds do not apply.

ORDER

It is Ordered: that Respondent's motion to terminate proceedings be **DENIED**.

It is Ordered: Respondent's application for a Waiver of Inadmissibility pursuant to former Section 212(c) of the INA be **DENIED**.

It is Further Ordered that: Respondent's application for a Waiver of Inadmissibility pursuant to Section 212(h) of the INA be **DENIED**.

It is Further Ordered that: Respondent be **REMOVED** from the United States to Nigeria pursuant to the charge contained in the Notice to Appear.

4/1/03
Date

/s/
William A. Cassidy
United States Immigration Judge

**CONSTITUTIONAL PROVISIONS,
STATUTES AND
DECISIONS OF THE
BOARD OF IMMIGRATION APPEALS
INVOLVED IN THE CASE**

CONSTITUTIONAL PROVISIONS

U.S. CONST. AMEND. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTES

IMMIGRATION AND NATIONALITY ACT ("INA") OF 1952, AS AMENDED

Section 101(a)(13), *codified at* 8 U.S.C. § 1101(a)(13)

§ 1101. Definitions

(a) As used in this chapter—

(13)

(A) The terms "admission" and "admitted" mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.

(B) An alien who is paroled under section 1182 (d)(5) of this title or permitted to land temporarily as an alien crewman shall not be considered to have been admitted.

(C) An alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States for purposes of the immigration laws unless the alien—

(i) has abandoned or relinquished that status,

(ii) has been absent from the United States for a continuous period in excess of 180 days,

(iii) has engaged in illegal activity after having departed the United States,

(iv) has departed from the United States while under legal process seeking removal of the

alien from the United States, including removal proceedings under this chapter and extradition proceedings,

(v) has committed an offense identified in section 1182 (a)(2) of this title, unless since such offense the alien has been granted relief under section 1182 (h) or 1229b (a) of this title, or

(vi) is attempting to enter at a time or place other than as designated by immigration officers or has not been admitted to the United States after inspection and authorization by an immigration officer.

Section 101(a)(43)(M), *codified at* 8 U.S.C. § 1101(a)(43)(M)

§ 1101. Definitions

(a) As used in this chapter—

(43) The term "aggravated felony" means—

(M) an offense that—

(i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or

(ii) is described in section 7201 of title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000;

Section 212(a)(2)(A)(i), *codified at* 8 U.S.C. § 1182(a)(2)(A)(i)

§ 1182. Inadmissible aliens

(a) Classes of aliens ineligible for visas or admission

Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

(2) Criminal and related grounds

(A) Conviction of certain crimes

(i) In general Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of—

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or

(II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of title 21),

is inadmissible.

Section 212(h), *codified at* 8 U.S.C. § 1182(h)

§ 1182. Inadmissible aliens

(h) Waiver of subsection (a)(2)(A)(i)(I), (II), (B), (D), and (E)

The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I), (B), (D), and (E) of subsection (a)(2) of this section and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana if—

(1)

(A) in the case of any immigrant it is established to the satisfaction of the Attorney General that—

(i) the alien is inadmissible only under subparagraph (D)(i) or (D)(ii) of such subsection or the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,

(ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and

(iii) the alien has been rehabilitated; or

(B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien; or

(C) the alien qualifies for classification under clause (iii) or (iv) of section 1154 (a)(1)(A) of this title or classification under clause (ii) or (iii) of section 1154 (a)(1)(B) of this title; and

(2) the Attorney General, in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status.

No waiver shall be provided under this subsection in the case of an alien who has been convicted of (or who has admitted committing acts that constitute) murder or criminal acts involving torture, or an attempt or conspiracy to commit murder or a criminal act involving torture. No waiver shall be granted under this subsection in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if either since the date of such admission the alien has been convicted of an aggravated felony or the alien has not lawfully resided continuously in the United States for a period of not less than 7 years immediately preceding the date of initiation of proceedings to remove the alien from the United States. No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver under this subsection.

Section 237(a)(2)(A), *codified at* 8 U.S.C. § 1227(a)(2)(A)

§ 1227. Deportable aliens

(a) Classes of deportable aliens

Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

(2) Criminal offenses

(A) General crimes

(i) Crimes of moral turpitude Any alien who—

(I) is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 1255 (j) of this title) after the date of admission, and

(II) is convicted of a crime for which a sentence of one year or longer may be imposed,

is deportable.

(ii) Multiple criminal convictions Any alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable.

(iii) Aggravated felony Any alien who is convicted of an aggravated felony at any time after admission is deportable.

(iv) High speed flight Any alien who is convicted of a violation of section 758 of title 18 (relating to high speed flight from an immigration checkpoint) is deportable.

(v) Waiver authorized Clauses (i), (ii), (iii), and (iv) shall not apply in the case of an alien with respect to a criminal conviction if the alien subsequent to the criminal conviction has been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States.

IN THE MATTER OF H——

In DEPORTATION Proceedings

A–4118292

Commissioner's Motion April 7, 1954
Decided by Board July 16, 1954

Pardon—Section 241 (b) of the Immigration and Nationality Act—Benefits aliens deportable under section 241 (a) (1) and section 241 (a) (4) of the Immigration and Nationality Act.

The pardoning provision contained in section 241 (b) of the Immigration and Nationality Act includes not only a person who is deportable under section 241 (a) (4), but also a person who is deportable under section 241 (a) (1) as an alien excludable at the time of entry because a member of a proscribed criminal class. As long as there is a full and unconditional pardon granted by the President or by a governor of a state covering the crime which forms the ground of deportability, whether the conviction was subsequent or prior to entry, the immunizing feature of the pardon clause applies, and such a crime no longer forms a basis for deportability.

CHARGE :

Warrant: Immigration & Nationality Act—Section 241 (a) (1)—Convicted of crime prior to entry, to wit: Forgery, uttering and larceny.

BEFORE THE CENTRAL OFFICE
(April 7, 1954)

Discussion : On the 2d day of April 1954, the Board of Immigration Appeals entered an order approving the decision of the special inquiry officer, dated February 18, 1954, wherein he entered an order for the termination of this proceeding. It was concluded that since the respondent had obtained a pardon for the crimes which

form the basis of the charge shown above, the charge was no longer sustainable.

The record relates to a 41-year-old married female, a native and citizen of Canada, who was lawfully admitted to the United States for permanent residence on January 6, 1912. On August 4, 1931, after a plea of guilty, respondent was convicted in the Superior Court, Suffolk County, Mass., of the crimes of uttering a forged instrument and larceny. These offenses involve moral turpitude. Respondent thereafter made two trips to Canada for short periods, one in 1940 and the other in 1943. She last entered the United States sometime in July 1943 at Newport, Vt., as a returning resident alien. Deportation proceedings were instituted based on the charge shown above by the issuance of the warrant of arrest on May 18, 1953, and the service thereof upon respondent on November 4, 1953. On November 18, 1953, respondent was granted by the Governor of the Commonwealth of Massachusetts a full and complete pardon for the crimes.

The issue presented is whether a pardon is effective to prevent deportation under the provisions of section 241 (a) (1) of the Immigration and Nationality Act for a charge based on the conviction of a crime involving moral turpitude prior to entry.

The Immigration Act of 1917, as amended, contained a proviso in section 19 (a) to the effect that the provision of such section respecting the deportation of aliens convicted of a crime involving moral turpitude should not apply to one who has been pardoned. It has been concluded both administratively and judicially that under this proviso, a pardon (as well as a valid recommendation against deportation) relating to a crime committed in the United States was effective to prevent deportation on a charge based on the commission of a crime prior to entry (*Perkins v. United States ex rel. Malesevic*, 99 F. (2d) 255 (C. C. A. 3, 1938) ; *Rasmussen v. Robinson*, 163 F. (2d) 732 (C. C. A. 3, 1947) ; *Matter of H— and Y—*, A–4799866, 3, I. & N. Dec. 236 (C. O., 1948)). These decisions were apparently based on the view that Congress intended the pardoning provisions to apply to crimes committed in the United States, prior to as well as after entry. However, even this view was not free from doubt. (See *United States v. Hughes*, 116 F. (2d) 613 (C. C. A. 3, 1940) ; *United States ex rel. Palermo v. Smith*, 17 F. (2d) 534 (C. C. A. 2, 1927) .)

It is, therefore, well established that were this case to be decided under the provisions of the Immigration Act of 1917, as amended,

respondent would not be deportable in respect to the crimes committed prior to her reentries. However, this proceeding was instituted under the provisions of the Immigration and Nationality Act, the pardon was obtained after the effective date of such act and, consequently, it is necessary to consider the provisions of such act. The present provision relating to pardons is contained in section 241 (b) and provides that the *provisions of subsection* (a) (4) respecting the deportation of an alien convicted of a crime or crimes shall not apply in the case of any alien who has subsequent to such conviction been granted a pardon or a proper recommendation against deportation. Specifically this provision provides that the pardon shall only apply to the provisions of section 241 (a) (4) of the act. Subsection (4) relates to the deportability of an alien based on a charge resulting from a conviction of a crime involving moral turpitude committed within 5 years after entry or for the conviction of two crimes involving moral turpitude after entry. Respondent's deportability in this case is not predicated upon the provisions of section 241 (a) (4) but rather those of section 241 (a) (1), no upon a crime committed after entry but rather upon a crime committed prior to entry. At the time of respondent's reentries into the United States in 1940 and 1943, she was within one or more of the classes of aliens excludable by the law existing at the time of such reentries. The pardon she obtained was issues on November 18, 1953, at a time when the Immigration Act of 1917, as amended, was no longer in effect. It cannot therefore be concluded that respondent's case comes within any of the savings clauses set forth in section 405 of the Immigration and Nationality Act.

It might be contended, however, that the provisions of section 241 (b) should be given the same effect as the proviso in section 19 (a) of the Immigration Act of 1917, as amended. However, as heretofore stated, the decisions in respect to that proviso were apparently based on the view that Congress intended the pardoning provisions to apply to crimes committed in the United States prior to as well as after entry. The reasoning applied in respect to the Immigration Act of 1917, cannot be applied to the provisions of the present act. By its very terms, section 241 (b) applies only to cases coming within the provisions of subsection (a) (4) of section 241. Thus, a legislative pardon which would have been effective to prevent deportation under the Immigration Act of 1917, as amended, no longer serves for such purpose (*Matter of R*—, E–080924, 5, I. &

N. Dec. 612 (B. I. A., January 14, 1954)). In that case the Board of Immigration Appeals stated in reference to section 241 (b) as follows:

> We construe this section to represent a change in the existing law. It is a canon of statutory construction that legislative language will be interpreted on the assumption that the legislature was aware of existing statutes, as well as the judicial interpretations thereof; and that if a change occurs in legislative language, a change was intended in legislative result. *Sutherland, Statutes and Statutory Construction*, volume 2, section 4510 (1943 ed.). It must be presumed, therefore, that when Congress enacted the Immigration and Nationality Act, it was aware of the judicial decisions which construed section 19 (a) of the 1917 act to include legislative pardons.

A similar conclusion was reached in the *Matter of I—*, E–25308, 5, I. & N. Dec. 343 (B. I. A., July 21, 1953) wherein a recommendation against deportation to prevent deportability under section 241 (a) (11) of the Immigration and Nationality Act was held to be ineffective. In that case the Board stated:

> Since the provision relating to a recommendation by the court against deportation is now specifically limited to persons who are deportable under section 241 (a) (4) and since there is no similar provision relating to section 241 (a) (11), under which the respondent is deportable, it follows that the recommendation against deportation which was made by the court in his case is not a bar to his deportation under section 241 (a) (11) of the Immigration and Nationality Act.

To the same effect in a case involving a recommendation against deportation for a narcotic offense, see the decision by the United States District Court for the Northern District of California, January 21, 1954, in the matter of *Ex parte Robles-Rubio*, 119 F. Supp. 610.

Should it be contended that the effect of a pardon is to wipe out a crime for immigration purposes, it might be pointed out that such a theory has been refuted by the decisions, administrative and judicial,

that foreign pardons are ineffective to prevent exclusion or deportation based on crimes committed in a foreign jurisdiction (*Matter of G—*, A-7873905, 5, I. & N. Dec. 129 (B.I.A., Feb. 17, 1953)) and that legislative pardons for immigration purposes are ineffective under the provisions of the present act.

In view of the above, it is the view of the Service that since the pardoning provision in the present act is limited to cases coming within the provisions of section 241 (a) (4) of the Immigration and Nationality Act, the pardon in this case is no bar to deportability under section 241 (a) (1) of the act. Consequently, respondent is deportable on the charge stated in the warrant of arrest. It is, therefore, deemed appropriate to request that the Board of Immigration Appeals reconsider and withdraw its order of April 2, 1954, and take such further action in the case as it deems appropriate.

Motion is hereby made that the Board of Immigration Appeals reconsider and withdraw its order of April 2, 1954, and take such further action in this case as it deems appropriate.

BEFORE THE BOARD
(July 16, 1954)

Discussion : The matter is before us on motion of the Assistant Commissioner, Inspections and Examinations Division, requesting that we reconsider and withdraw our order of April 2, 1954, and take such further action in the case as appears appropriate. In our previous order we approved the decision of the special inquiry officer, dated February 18, 1954, wherein he ordered termination of the deportation proceedings on the basis of a full and complete pardon granted the respondent on November 18, 1953, covering the crimes of uttering a forged instrument and larceny, such pardon being granted by the Governor of the Commonwealth of Massachusetts.

The record relates to a native and citizen of Canada, 42 years old, female, who was lawfully admitted to the United States for permanent residence on January 6, 1912. On August 4, 1931, the respondent was convicted on her plea of guilty in the Superior Court, Suffolk County, Mass., of the crimes of uttering a forged instrument and larceny. Thereafter, she made brief visits to Canada in 1940 and 1943 and last entered the United States about July 1943 at Newport, Vt., being admitted as a returning resident alien.

Section 19 (a) of the Immigration Act of 1917, as amended, (8 U. S. C. 155 (a) 1940 ed.) contains the following proviso:

> *Provided further*, That the provision of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned, nor shall such deportation be made or directed if the court, or judge thereof, sentencing such alien for such crime shall, at the time of imposing judgment or passing sentence or within thirty days thereafter, due notice having first been given to representatives of the State, make a recommendation to the Attorney General that such alien shall not be deported in pursuance of this Act; * * *.

In interpreting the proviso relating to valid pardons and recommendations against deportation the rule was laid down that the effectiveness of such pardons and recommendations against deportation was not limited to deportation proceedings based on the commission of a crime subsequent to entry but was also effective as to commission of crime prior to entry ; that the proviso applied equally to exclusion and deportation proceedings and to arrest and deportation proceedings.[7]

It is contended, however, by the Service that sectin 241 (b) of the Immigration and Nationality Act represents a change in the law and must be given effect. Section 241 (b) provides as follows:

> The provisions of subsection (a) (4) respecting the deportation of an alien convicted of a crime or crimes shall not apply (1) in the case of any alien who has subsequent to such conviction been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States, or (2) if the court sentencing such alien for such crime shall make, at the time of first imposing judgment or passing sentence, or within thirty days thereafter, a recommendation to the Attorney General that such alien

[7] *Perkins v. United States ex rel. Malesevic, (supra) ; Rasmussen v. Robinson (supra) ; Matter of H— and Y—, (supra).*

not be deported, due notice having been given prior to making such recommendation to representatives of the interested State, the Service, and prosecution authorities, who shall be granted an opportunity to make representations in the matter.

It is the position of the Service that in view of the specific reference to subsection (a) (4) of section 241 of the Immigration and Nationality Act (which provides for the deportation of aliens convicted of a crime involving moral turpitude committed within 5 years after entry and sentenced or confined to imprisonment for a year or more, or who at any time after entry are convicted of two crimes involving moral turpitude), the forgiveness aspect of pardons and recommendations against deportation must be confined to this particular ground of deportability.

It is true that we have given effect to the change in statutory language so as to make the pardon feature not applicable in certain situations. Thus in *Matter of R—, (supra)*, we held that in view of the limitation in section 241 (b) to full unconditional pardons by the *President* of the United States or by a *Governor* of any of the several States, a legislative pardon under the law of Pennsylvania was no longer effective to prevent deportation under a charge laid under the provisions of section 241 (a) (4) of the Immigration and Nationality Act; likewise we held in *Matter of I—, (supra)*, that a recommendation against deportation upon a charge predicated upon a *narcotic* violation was not a bar to deportation under section 241 (a) (11) because narcotic violations were not referred to in section 241 (b). We have also concluded that *conditional* pardons were not effective under section 241 (b) of the Immigration and Nationality Act because this section specifically refers to full and unconditional pardons. However, we do not believe that these references are necessarily dispositive of the question in this case since the disposition of those cases rested upon other terminology in section 241 (b).

It is to be remembered that the respondent in the present case is deportable under section 241 (a) (1) of the Immigration and Nationality Act on the ground that at the time of entry she was within one or more of classes of aliens excludable by the law existing at the time of such entry because of the commission and admission of a *crime*. It is to be noted that section 241 (b) refers to

the deportation of an alien convicted of a *crime* or *crimes*. Thus, in both instances, the subject matter is in *pari materia*. We are aware of no congressional intent to be more lenient to a person convicted of a crime in the United States subsequent to an original entry and prior to a reentry.

We are not here dealing with a foreign pardon, or a legislative pardon, or a conditional pardon. The important feature is that a governor of a state has granted a valid pardon of a crime committed in the United States. Previously such a pardon was effective to "immunize" the offending alien from being expelled from this country because of that criminal conduct. Paraphrasing an analogous situation under the 1917 Immigration Act respecting a recommendation against deportation,[8] it is not inconsistent with the legislative pattern for the enforcement of the immigration laws to hold, that the relief from expulsion granted under the pardoning clause should be extended to immunize the same alien for the same offense when he seeks to reenter the United States, where such an alien committed his offense in the United States and a valid pardon has been granted to prevent his expulsion; essentially, it does not matter whether the alien is the subject of exclusion proceedings or warrant proceedings.

An examination of the legislative history of the Immigration and Nationality Act fails to disclose any intent to change the prior administrative and judicial holdings that pardons were equally effective in exclusion or in expulsion proceedings. Mr. Walter M. Besterman, Legislative Assistant, Committee on the Judiciary, House of Representatives, in his commentary on the Immigration and Nationality Act,[9] stated that an alien deportable because of conviction of a crime or crimes involving moral turpitude will not be deported if, subsequent to his conviction, he has been granted a full and unconditional pardon by the President of the United States or by the Governor of any State. The substance of section 241 (b) is that deportation shall not be undertaken against a convicted alien who has been pardoned upon the basis of the crime or crimes which constitute the subject matter of the pardon. There is no sound basis in logic or in reason to hold that this pardoning forgiveness or immunity applies to an alien who has been convicted of a crime involving moral

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[8] *Matter of H— and Y—*, 3 I. & N. Dec. 236, 243.

[9] 8 U. S. C. p. 63 (1952 edition).

turpitude within 5 years after entry, and not to the case of the instant respondent, who has resided in this country since 1912 and who committed a crime prior to her last entry as a returning resident in 1943. To adopt such a construction would in effect negate a clearly expressed congressional intent to immunize the pardoned criminal from the consequences of his criminal act.

It is concluded therefore that the pardoning provision contained in section 241 (b) of the Immigration and Nationality Act includes not only the criminal who is deportable under section 241 (a) (4), but also the criminal who is deportable under section 241 (a) (1) because a member of a proscribed criminal class, section 212 (a) (9), at time of entry. As long as there is a full and unconditional pardon granted by the President or by a Governor of a State covering the crime which forms the ground of deportability, whether in exclusion or in expulsion, the immunizing feature of the pardon clause applies, and such a crime no longer forms a basis for deportability. The motion to reconsider will accordingly be denied.

Order : It is ordered that the motion to reconsider and withdraw our prior order affirming the decision of the special inquiry officer terminating the proceedings be and the same is hereby denied.

OTHER DOCUMENTATION
FROM THE
ADMINISTRATIVE RECORD

STATE OF ALABAMA
BOARD OF PARDONS AND PAROLES
LURLEEN B. WALLACE BUILDING
500 MONROE STREET
P.O. BOX 302405
MONTGOMERY, ALABAMA 36130 – 2405

04-27-2004

PETER G T BALOGUN
309 FONVILLE STREET
TUSKEGEE AL 36083

DEAR SIR OR MADAM:

ENCLOSED IS YOUR CERTIFICATE OF PARDON WITH RESTORATION OF CIVIL AND POLITICAL RIGHTS, WHICH WAS GRANTED BY THE BOARD OF PARDONS AND PAROLES ON 03-02-2004

SINCERELY,

/S/

WILLIAM C. SEGREST
EXECUTIVE DIRECTOR

ENC: CERTIFICATE

AIS#: 814743

CC: TUSKEGEE

EXH. 1

000019

STATE OF ALABAMA
BOARD OF PARDONS AND PAROLES

CERTIFICATE OF PARDON WITH RESTORATION OF CIVIL AND POLITICAL RIGHTS

KNOW ALL MEN BY THESE PRESENTS:

IT HAVING BEEN MADE TO APPEAR TO THE ALABAMA STATE BOARD OF PARDONS AND PAROLES THAT PETER G T BALOGUN 814743 WAS CONVICTED OF THE FOLLOWING DISQUALIFYING OFFENSES:

COUNTY	CASE NUMBER	DATE	OFFENSE	SENTENCE
MONT-GOMERY	CR1987-000174	04-28-1988	CON TO EMBEZZ	000 L5 000CS
MONT-GOMERY	CR1987-000174	04-28-1988	CON TO EMBEZZ	000 L5 000CS

AND IT FURTHER APPEARING TO THE BOARD FROM THE OFFICIAL REPORT OF THE PAROLE OFFICER, WHICH IS A PART OF THE RECORD IN THIS CASE, THAT THE ABOVE NAMED HAS SO CONDUCTED HIMSELF AS TO DEMONSTRATE HIS REFORMATION AND TO MERIT PARDON WITH RESTORATION OF CIVIL RIGHTS;

NOW, IN COMPLIANCE WITH THE AUTHORITY VESTED IN THE STATE BOARD OF PARDONS AND PAROLES BY THE CONSTITUTION AND THE LAWS OF THE STATE OF ALABAMA TO GRANT PARDONS AND TO RESTORE CIVIL AND POLITICAL RIGHTS, IT IS

ORDERED THAT A PARDON BE GRANTED TO THE ABOVE NAMED AS A RESULT OF THE ABOVE STATED CONVICTION(S), AND IT IS FURTHER ORDERED THAT ALL CIVIL AND POLITICAL RIGHTS WHICH WERE FORFEITED AS A RESULT OF THE AFORESAID CONVICTION(S) OTHER THAN THOSE RIGHTS SPECIFICALLY EXCLUDED BY THE

TERMS OF THIS CERTIFICATE BE AND THEY ARE HEREBY RESTORED.

GIVEN UNDER THE HAND AND SEAL OF THE STATE BOARD OF PARDONS AND PAROLES, THIS THE 2ND DAY OF MARCH, 2004.

ALABAMA BOARD OF PARDONS AND PAROLES

/S/

WILLIAM C. SEGREST
EXECUTIVE DIRECTOR